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phone conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 GMO GAMECENTER USA, INC., et
4 al.,

Plaintiffs,

5 v.

22 Civ. 5974 (JPC)
Remote Proceeding

6 WHINSTONE US INC.,

7 Defendant.

8 -----x

9 New York, N.Y.
10 August 9, 2023
2:05 p.m.

11 Before:

12 HON. JOHN P. CRONAN,

13 U.S. District Judge

14 APPEARANCES

15
16 HAYNES AND BOONE, LLP (NY)
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1 (The Court and all parties appearing telephonically)

2 THE COURT: Good afternoon. This is Judge Cronan. We
3 are here for GMO Gamecenter USA v. Whinstone US; 22 Civ. 5974.

4 Before we begin, I will note that we have a court
5 reporter joining us for this proceeding. I will ask counsel to
6 please be sure to identify themselves when we speak so we have
7 an accurate transcript. I also will ask anyone who is not
8 speaking to please stay on mute so we avoid any background
9 sound. And lastly, I remind anyone joining that the Court
10 prohibits recording and rebroadcasting of Court conferences,
11 including this one, and violation could result in sanctions.

12 So let me find out who we have on for the parties. I
13 will start with the plaintiff.

14 MS. THORNE: Sure. This is Leslie Thorne for GMO. I
15 also have a couple other colleagues on the line. I will be
16 offering argument but would you like their names for
17 appearances sake?

18 THE COURT: Thank you, Ms. Thorne; yes, if you can
19 tell me who else is joining you.

20 MS. THORNE: I have Giorgio Bovenzi is on; Gil Porter;
21 and Jason Jordan. And I believe that is everyone but if
22 someone else is on, please, just announce yourselves.

23 MR. FREYBERG: Mike Freyberg as well.

24 THE COURT: Thank you very much and welcome to
25 everyone.

N895gmoC

Phone Conference

1 For the defendant?

2 MS. O'CONNOR: Yes, your Honor, Maeve O'Connor of
3 Debevoise & Plimpton for the defendant, and with me are some of
4 my colleagues as well -- Elliott Greenfield, Brandon Fetzner,
5 and Jillian Tancil.

6 THE COURT: Good afternoon to all of you as well.

7 So the purpose of this proceeding is to address the
8 plaintiff GMO's application for injunctive relief on basically
9 an issue regarding the preservation of evidence that was framed
10 as an injunction but is largely a discovery dispute here. I
11 have reviewed the submissions from the parties as well as the
12 status letter that was filed yesterday, and the declaration
13 from Kenyon Hayward. I will ask the parties now if there is
14 anything else you wish to add.

15 Ms. Thorne, since this is your application I will
16 start with you.

17 MS. THORNE: Sure. I certainly don't want to repeat
18 everything you have read, but in our view we are here because
19 Whinstone wants to use its wrongful termination of the parties'
20 agreement to shirk its obligation to preserve evidence. We
21 have put forth testimony from our expert as to exactly what is
22 needed and why, even well, well in advance when our expert
23 disclosures would be due, and well, well in advance of the
24 February 16 close of expert discovery. That has not been
25 controverted by anything that Whinstone has said. Essentially,

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1 our expert has testified that he really needs two months to
2 observe and test the facility. Obviously, all the reasons for
3 that are outlined in his declaration, but principally we are
4 talking about, you know, observing conditions bearing directly
5 upon machine operation and performance, the changeover time,
6 like how often the machines get turned on and off, and perhaps,
7 most critically, the temperature, which is a function of
8 exceptionally three things: The outside conditions, the number
9 and length of time machines are running, and the operation of
10 heat mitigation systems. Whinstone's only response to that is
11 there are outdoor heat fluctuations over the course of a single
12 day and that we don't really have a basis to say that there are
13 any other changes, malfunctions, anything like that over a long
14 period. But here, in one visit that we were able to do, three
15 of the 15 or so transformers were broken, part of the cooling
16 system was either not on or not working, and Whinstone
17 represented that that's not representative of the normal
18 conditions but here Whinstone has produced fewer than a hundred
19 documents, they will not agree to produce the technical
20 documents that we have sought, they won't allow us to video or
21 photograph before the one hour, one visit we had, and they've
22 destroyed months and months of video evidence. So here we are
23 really trying to get the scraps we can to prove our case and
24 that leads to sort of my second point, which is, our expert is
25 informed on the best practices group data mining centers.

N895gmoC

Phone Conference

1 Whinstone has asserted, as recently in its opposition brief,
2 that it is still a facility that is state of the art. In the
3 one visit we had we uncovered several circumstances that oppose
4 that but we are working sort of blindly because we don't have
5 any documents or any commitment to what documents even exist.
6 And so, without a fulsome production of anything like that on
7 these issues, we think it is important that our expert has an
8 opportunity to look at the conditions, measure the conditions,
9 so that we can put something together given the lack of other
10 evidence.

11 Against that backdrop, I think if you look at the law
12 it is consistent with this. Other courts have issued
13 preservation orders, they have issued them for longer than we
14 are seeking. In our view, we are really not asking for the
15 moon here, we are not even asking for the end of expert
16 discovery, we are simply asking for two months that our expert
17 can get in there, measure what is going on, and observe it.

18 And with that -- I know your Honor you have read
19 everything -- do you have questions for us that we can address
20 for you?

21 THE COURT: I thank you, Ms. Thorne. One thing I was
22 trying to understand better and you touched upon this a bit,
23 but your expert does mention a few times that the expert would
24 need at least two months but I am having trouble understanding
25 why a full two months is necessary and not a shorter period of

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Phone Conference

1 time. Why would four weeks not be enough here?

2 MS. THORNE: You know, I am not a Bitcoin expert but
3 obviously we have talked to our expert a good bit about this,
4 and part of the reason is because we have a total dearth of
5 information from Whinstone to go on and so I will give you one
6 example.

7 Our expert has said, for instance, that the
8 temperature inside the building is a critical component to the
9 functioning of the machines. And that changes depending on how
10 many machines are in service, whether or not the heat
11 mitigation systems are working, as well as the outside
12 temperature, and that changes over time and really affects the
13 way the machines run. Another thing that affects it is how
14 often the facility is turning on and off the machines because,
15 apparently, the more you turn them on and off, the more likely
16 they are to malfunction, is my understanding. Here, our expert
17 sort of had to jump into action earlier than, frankly we were
18 ready to, in light of this surprise termination. And the
19 reason I mention the documents is because our expert -- and I
20 believe this is in his supplemental declaration -- said that
21 most places keep a record of what the temperature inside has
22 been. Here we learned, just through this process, that
23 Whinstone does not do that, they don't have any record of the
24 temperature. And so, when we have had the occasion to go once,
25 seen the conditions, those conditions are represented to us by

N895gmoC

Phone Conference

1 Whinstone folks as not representative, it is especially
2 important for him to have a decent period of time to look at
3 these fluctuations and be able to determine for himself what is
4 representative and what is not when there is no documentary
5 evidence to point to other than that.

6 THE COURT: Your point then that these, the
7 documentary evidence that might otherwise assist your expert,
8 that that doesn't exist? Or is it that it has not been
9 produced to you? It sounds like you are saying that the
10 documents just don't exist. And I will ask Ms. O'Connor, as
11 well, that.

12 MS. THORNE: I think it is a bit of both. They have
13 informed us that the records with respect to temperatures
14 simply do not exist, they don't record that, so that is
15 something that needs to be measured over time to understand
16 what is the heat profile of this building and how is that
17 affecting the machines.

18 With respect to some of the other documents that we
19 have sought, other technical documents about machine
20 performance, functioning of evaporative walls -- the
21 evaporative walls are the cooling system -- records of when
22 power turned on and on off, we don't know if those exist or
23 not.

24 THE COURT: Can you also address, I guess basically,
25 what happened in July? The notice of termination was sent on

N895gmoC

Phone Conference

1 June 29 and your expert arrived there earlier this month, I
2 believe on August 1. Why didn't more occur in July?

3 MS. THORNE: Sure. I think there are sort of two
4 issues issue here. I know Whinstone has argued why didn't you
5 do this earlier? There is two periods here, before the
6 termination notice and after the termination notice, and I
7 think what you are most focused on here is after the
8 termination notice. Whinstone keeps saying we had a month to
9 do these things -- but that is simply not the case. First,
10 Whinstone cut off the power when they sent the termination
11 notice, not a month later. So the issue here where we need to
12 observe the machines in action, that was done immediately upon
13 entry of the notice. Also, I mean, here the termination was
14 out of nowhere, months before the expert designation
15 deadline -- by design, we think -- and in the midst of our
16 repeatedly pushing for the production of video evidence. So,
17 yes, it did take us three weeks to get our expert up to speed
18 but I had never even spoken to our expert before. We needed to
19 get him up to speed, review information, talk to his new
20 client, and figure out what was needed. And I say that because
21 we weren't going to haul off and file, you know, a motion and
22 bother this Court before we figured out what was actually
23 necessary and what he actually needed, which we didn't know
24 before because we thought we had, you know, months to delve
25 into that, especially because we didn't have any document

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1 productions for Whinstone. So that's what that lag was.

2 I also just wanted to note, because it was noted in
3 Whinstone's portion of the joint letter, they also seem to say
4 you should have been doing things before termination. I just
5 wanted to correct some false statements in there. First, their
6 argument that we could have been gathering this information is
7 false. All GMO workers were explicitly prohibited from taking
8 photos or video, as were we, counsel, when we visited in March.
9 Second, these really are expert issues. We have done
10 everything we can to scramble and try to get an expert up to
11 speed so he could figure out what was needed ever since we got
12 the termination.

13 THE COURT: I understand that GMO will be paying the
14 hosting fee for the duration of this but it seems to me that
15 that fee is considerably less than what Whinstone otherwise
16 would be receiving for hosting. Can you address that issue and
17 how that comes into play and the millions of dollars it sounds
18 like Whinstone will be losing out on if I grant the relief you
19 seek?

20 MS. THORNE: I would be happy to.

21 First and foremost, there is a presumption that
22 parties bear their own costs of preservation. Second, there is
23 no competent evidence of costs here. What you have is a
24 totally conclusory affidavit without any corroborating
25 invoices, without even whole numbers. There is really no

N895gmoC

Phone Conference

1 foundation whatsoever to support that and, in fact, courts have
2 looked at affidavits just like these and said that they are not
3 competent evidence because they are -- they simply lack
4 foundation.

5 And also I would say, from what we do know is out
6 there, Whinstone has said oh, GMO shouldn't be allowed to just
7 may what they were paying under the contract, they should have
8 to pay market. But what they leave out is that they don't pay
9 market, they pay the utility under a long-term contract where
10 the price of power they pay is exactly the same, by design, to
11 the amount that GMO pays them. And so, the idea that they have
12 these other costs is simply false. They don't. They are
13 paying for power what we pay them under the contract and that
14 we are happy to continue paying them, even though they bear the
15 costs of preservation here.

16 I would also note that there are statements about all
17 these supposed profits they would have, are also not competent
18 evidence. There is no evidence that's the case. The case of
19 *Toussie* we cited in our papers specifically rejects this
20 reasoning. You can't get out of obligation to preserve
21 evidence just because you might profit from doing so; there it
22 was the sale of valuable property. And I would also argue that
23 the affidavit that you have in front of you from Mr. Davidson
24 is not credible for two reasons: One, these machines have been
25 here and up and running for the entire duration of this

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1 lawsuit. This is not something new. And I would also note
2 that, as reflected in the supplemental affidavit, many of the
3 racks at this facility are just sitting empty. So, we know
4 that they aren't even using the space that they do have so this
5 argument that, oh, we would be making millions and millions and
6 millions of dollars every month is both without foundation and
7 all evidence to the contrary.

8 THE COURT: Thank you, Ms. Thorne. Let me hear now
9 from Ms. O'Connor.

10 MS. O'CONNOR: Thank you, your Honor.

11 So I would obviously like to respond to a number of
12 things we just heard and I think we have a very different
13 perspective on virtually every aspect of this. So, just taking
14 a step back to frame up what is at issue, because it does seem
15 we are talking across purposes, we have heard a lot about how
16 GMO is operating blind, they really don't have information they
17 need, and we have unjustly terminated the contract and have ill
18 intent or various assertions like that. GMO is not operating
19 blind. This is their facility -- and I will come around to
20 that -- but they have employees on site. So, this is really
21 not a dispute about evidence preservation and spoliation, it is
22 about GMO wanting to generate evidence at Whinstone's expense
23 to fill in gaps in its case and specifically evidence on
24 matters that have been within GMO's custody and control since
25 the contract began and that GMO has not preserved. And, the

N895gmoC

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1 relief that they're seeking here is very extreme. It is not
2 evidence preservation-type relief, it is a mandatory
3 injunction. It would require Whinstone to continue to perform
4 under a terminated contract for eight additional weeks and, not
5 for nothing, would permit GMO to continue to mine Bitcoin for
6 gain throughout that period because powering the machines means
7 that they're mining -- all of this at very significant expense
8 to Whinstone.

9 It is not true that Whinstone pays the same rate as
10 the contract rate. Whinstone's cost for providing power
11 greatly exceeds the contract rate so there is no question that
12 requiring Whinstone to provide power at the contract rate would
13 cause significant loss to Whinstone, and if there is some
14 further documentation that would be helpful around that, we are
15 happy to provide it.

16 This case, obviously, is a contract dispute that
17 relates to Bitcoin mining and I think it is important to
18 understand that GMO partnered with Whinstone to build this
19 facility in Texas to house and power GMO's machines for its
20 operation. And this whole thing was within GMO's custody and
21 control; it was their machines, this was their network, it was
22 their stream of diagnostic data. They provided the miners for
23 the Bitcoin mining operation, they had access to the facility.
24 They had their own repair facility on-site, they had their own
25 employees on-site, and they serviced their own machines. Over

N895gmoC

Phone Conference

1 time, plaintiffs developed a theory that the conditions at the
2 facility were somehow adversely impacting the performance of
3 their machines and they decided to file suit based on that
4 theory. They articulated that theory in some type of public
5 filing in Japan saying the poor performance was due to
6 operational conditions. They have never detailed that theory
7 for us, it is their theory about their claims and it was their
8 obligation to preserve the evidence that they're now saying is
9 critical. And, that would have been easy to do, they could
10 have taken temperature readings every day outside and inside.
11 They could have looked at which machines were working and not
12 working, and transformers. It would have been easy for them to
13 do all of this because they were there, their employees were
14 there.

15 I think that, you know, plaintiffs have tried very
16 hard to make this seem fact intensive and complex. It is
17 actually quite simple. This isn't a nuclear reactor where they
18 need our key to get inside. The evidence that they say they
19 need is observational. And you can tell that from their
20 expert's supplemental declaration which, by the way, we think
21 was completely improper and not disclosed to us until it hit
22 the docket, but it is evidence about temperature, weather,
23 evidence about things that could be observed. Plaintiffs have
24 had lots of time to preserve this observational evidence, they
25 know what their theory is, we don't. Their employees have been

N895gmoC

Phone Conference

1 on site throughout the contract period, they have had three
2 years of operations, more than a year since they filed suit and
3 have had these 10 weeks of time from May 24th through August 2
4 when they filed this motion where we kind of explicitly urged
5 them to collect any outstanding evidence and, you know, they
6 didn't do that. So we do feel this is an emergency of their
7 own making and, in our view, the request that they are making
8 is essentially trying to use building A of this Texas facility
9 as sort of a laboratory for their expert to test and observe
10 various conditions that plaintiffs base their claims on but
11 previously failed to document. We see this as evidence
12 creation.

13 Another interesting point to emphasize here, according
14 to plaintiff's argument this experiment is not likely to be
15 useful for obtaining evidence that is representative of
16 conditions at the facility over the course of the Texas
17 Agreement because plaintiffs have repeatedly said that
18 conditions at the facility are already materially changed, and
19 separate and apart from that, plaintiffs themselves have moved,
20 destroyed thousands of machines just since March. So the
21 situation is not static and the request for eight weeks feels
22 arbitrary, at best, and not based on anything concrete that
23 their expert can point to apart from we just want more time, I
24 want to come back three times on different days because the
25 weather might be more widely different than if I observed

N895gmoC

Phone Conference

1 continuously for 24 hours for a shorter period when the average
2 temperature change is 20 to 25 degrees. It just feels like an
3 arbitrary request. It would impose tremendous expense and
4 burden on Whinstone. We have a lost opportunity cost of about
5 \$4.6 million a month, we have costs of just maintaining their
6 machines with the security and the cooling and the power of at
7 least \$900,000 a month, and so we believe that our proposal
8 really strikes an eminently fair balance under these
9 circumstances, that the significant cost to Whinstone of
10 further extending this period of time for GMO to observe the
11 facility in the hope that things might change -- right -- maybe
12 a different transformer will break over time, or maybe if we
13 observe for a longer period of time we will notice that a
14 cooling wall has gone down, or maybe if we observe for a longer
15 period of time we will see a more extreme temperature. Those
16 are speculative and they're not concrete, they're not real, and
17 we don't feel that that justifies imposing this enormous cost
18 when GMO has had people on-site who apparently made the
19 observations underlying this lawsuit but never preserved them.

20 I would like to just address a couple more points and
21 then obviously I want to see if the Court has any questions,
22 but one was document production, the sense that they're just
23 really struggling to make their case because we are not
24 producing documents. We are ahead of plaintiffs in document
25 production. We have done more than they have done and so this

N895gmoC

Phone Conference

1 is a, I think, a two-way street. We sent them hit counts,
2 terms for hit counts ages ago. They just sent us hit counts
3 earlier this week. They really haven't produced anything. So,
4 I think that insinuations of foul play are really have no place
5 in this conversation.

6 Finally, this notion of videotapes. Ms. Thorne
7 suggested that we terminated the contract because they were
8 pressing us for evidence -- videotape evidence. This is a
9 complete red herring. There are video security machines
10 outside the facility. We did not think that those have any
11 conceivable relevance because this isn't a case where we are
12 trying to see, like, who broke into the facility with a crowbar
13 at 2:00 in the morning. I don't know what relevance that has.
14 There are not operable video machines inside the facility,
15 there haven't been for years, so we just think that whole thing
16 is sort of a red herring that I think cast aspersions on us
17 that are not helpful in resolving this. And the final point I
18 will make, your Honor, if I may, this is really a situation
19 where we bent over backwards to try to have a conversation
20 about evidence, make sure that they have the evidence preserved
21 that they needed for trial and to make sure that to the extent
22 they were repairing and trashing their own machines, that there
23 was a record of that for the trial. We raised it several
24 times. We, starting in May of 2023 after we had seen them
25 disposing of a large number of machines, we followed up to try

N895gmoC

Phone Conference

1 to confirm their response that they had all the evidence they
2 needed. They rejected our suggestion of a consultant going in
3 to work together. You know, this went on and on, and I think
4 we do have a little bit of a feeling of that we acted here in
5 the utmost good faith and that no good deed goes unpunished
6 because we kept offering have 30 days. OK, we are terminating,
7 we will give 30 days. Come in, we will work with you. Then
8 they asked for more time, we gave them more time, they used it
9 to file this motion, so we found it challenging to move
10 productively forward in this conversation, although we feel we
11 have acted tremendously in good faith and don't appreciate the
12 insinuation to the contrary.

13 I would be happy to answer any questions, your Honor,
14 if you have them for me.

15 THE COURT: Thank you. Can you help me understand why
16 the decision to send the termination notice was made on
17 June 29? What prompted that?

18 MS. O'CONNOR: I think just ongoing -- these were
19 issues that were frustrating to the parties and constituted a
20 material breach because the plaintiffs were supposed to be
21 negotiating with us in good faith to have a new agreement in
22 place, they were supposed to be utilizing their maximum power,
23 and they would not engage on any of these fronts. We had had a
24 couple of failed efforts to engage with them regarding these
25 issues and felt that, you know, enough already, it was time to

N895gmoC

Phone Conference

1 send termination notice, that we were within our rights to
2 send. It was not related to video evidence, certainly.

3 THE COURT: What I was trying to understand what this
4 sounds like, the former attorney before I believe you came on
5 this case, raised this issue of a breach back in mid-2022 and
6 then the termination notice wasn't until about a year later.
7 Is that because there were discussions going on in the interim,
8 I take it?

9 MS. O'CONNOR: Yes, there were efforts in the interim,
10 is my understanding, to make progress. From our perspective,
11 not successful at all. The parties had a failed mediation,
12 there were various efforts to see if there was a way to resolve
13 this without continuing down the road of litigation, which is
14 where termination had the possibility of going.

15 THE COURT: Ms. O'Connor, there was one allegation, I
16 believe, on page 12 of GMO's brief, that Whinstone had taken
17 steps to prevent GMO's ability to assess the machines by
18 cutting the power supply and removing the machine from
19 operations. Can you address that?

20 MS. O'CONNOR: I apologize, your Honor. One moment?

21 (pause)

22 MS. O'CONNOR: Where was this your Honor? Page 12 of
23 their brief?

24 THE COURT: I believe so. Give me one moment.

25 MS. O'CONNOR: I will try to find it but it may be a

N895gmoC

Phone Conference

1 reference to termination that we cut the power upon sending the
2 notice of termination and said that we intended to de-install
3 their machines but would provide a 30-day period for them to
4 come in and do whatever they needed to do if they felt there
5 was evidence they needed to preserve, which they already told
6 us they didn't think was the case.

7 THE COURT: What I was referring to here is the last
8 paragraph on page 12 references Whinstone having cut the power
9 supply to GMO's machines and it wasn't clear to me what exactly
10 that was referring to. Can you help me with that?

11 MS. O'CONNOR: I believe, your Honor, that is a
12 reference to the termination.

13 THE COURT: I will ask everyone to give me a moment
14 here.

15 (pause)

16 MS. THORNE: If I may, because I think we are talking
17 about my brief, if I can elucidate?

18 THE COURT: This is Ms. Thorne.

19 MS. THORNE: Is this the part where it says GMO has
20 alleged that Whinstone failed to provide sufficient power,
21 etc., etc.?

22 THE COURT: Thank you, yes.

23 MS. O'CONNOR: I thought it was the bottom paragraph
24 of page 12.

25 THE COURT: So, Ms. Thorne, in part you have

N895gmoC

Phone Conference

1 referenced mainly the second sentence from the last paragraph
2 because Whinstone has cut the power supply to GMO's machines
3 and plans to unilaterally remove GMO's machines from operation.
4 I understand the second part, the plaintiff's view to remove
5 the machine, but the reference to Whinstone having in the past
6 cut the power supply, what are you referring to there?

7 MS. THORNE: Yes. In March 2022, Whinstone removed
8 tens of thousands of machines from operation and moved them to
9 another building.

10 THE COURT: I see.

11 MS. THORNE: That is part of the reason. As they know
12 there has been significant correspondence on this, why video is
13 important and should have been maintained and was not because
14 there has been a dispute between the parties about where those
15 machines were moved to and how they were treated.

16 THE COURT: What is the relevance of this video from
17 your perspective then, Ms. Thorne? It sounds like from
18 Ms. O'Connor that this video evidence wouldn't have been that
19 useful either way.

20 MS. THORNE: Sure.

21 From our perspective it is critical because of that
22 very issue. One of the things, one of the many things that
23 Whinstone has done here is they have not provided sufficient
24 power and they have removed our machines without cause and
25 thrown -- mistreated them and thrown them around into piles in

N895gmoC

Phone Conference

1 another building. They have said they did not do that. And
2 so, we have been asking for the video evidence of this for some
3 time. They only recently said that the video evidence is
4 destroyed every 30 days so they would keep only the previous 30
5 days. In addition to those videotapes, Whinstone was
6 videotaping our workers while they were working and in the
7 facility and they have not produced those either. I don't know
8 if those have been destroyed also but they have not been
9 produced.

10 And with respect to whether we could have created this
11 documentation, we could not. Every time someone enters the
12 facility, including the GMO workers, they have to sign an
13 agreement that they will not video, they will not modify
14 anything in the facility, they will not take any photographs,
15 they will not record anything in any way, or they are not
16 permitted entry. So the idea that this could have been
17 preserved by us, the conditions of the facility, is simply not
18 accurate. They were specifically forbidden from doing that.

19 And I wanted to address a couple of other things but I
20 didn't want to interrupt your Honor, if your Honor is still
21 asking Ms. O'Connor questions.

22 THE COURT: No, you may continue, Ms. Thorne.

23 MS. O'CONNOR: OK. I would like to respond to a
24 number of the things we just heard but I will wait.

25 THE COURT: Actually, why don't we stay on one topic

N895gmoC

Phone Conference

1 at a time then. So Ms. Thorne, I will go back to you in a
2 moment.

3 MS. THORNE: Sure.

4 THE COURT: Ms. O'Connor.

5 MS. O'CONNOR: OK. I do feel that the level of
6 accusations here is truly not productive but I need to respond
7 to some of this. GMO has never used the power allotted to it.
8 There is no basis for the suggestion that we did not adequately
9 power their machines apart from the limited transformer issue
10 that's been discussed. Their machines are not functional, they
11 are old, they are broken down, and the issue that arose in
12 March of 2022 is not -- I don't think the facts around that
13 have any relevance to whether evidence is being preserved now,
14 I don't think there is relevance to any issues before this
15 court. But, fundamentally, they had so many non-functional
16 machines that it was causing the entire facility to fail. So
17 what Whinstone had to do was gather up non-functional machines
18 and put them in another room for testing and consolidate so
19 that the system would work. And that's not something that
20 videotape is needed to establish. I still don't see any
21 relevance of that. There is no truth to the assertion that
22 their people were videotaped inside the facility because there
23 aren't working interior videotape machines.

24 I just, I feel that we are going in an unproductive
25 direction of a lot of insinuation that's not really on point

N895gmoC

Phone Conference

1 for the issues that are before the Court today and I hope that
2 we can stay in a more productive type of conversation.

3 In terms of there is a standard visitor form that I
4 think says don't take photographs. They never asked to take
5 video. Nothing prevented them from taking temperature
6 readings, nothing prevented them from documenting their dust
7 findings in other ways and comparing the outside temperature,
8 and I think the important thing to emphasize is that we can't
9 read their minds but they have a theory on which they sued us
10 based on observations that they did not document, and then they
11 let another year go by, still without documenting them, and
12 then they let another 10 weeks go by, still without documenting
13 them, and now want to hold us up for two more months so that
14 they can create evidence that they will argue is or is not
15 representative of prior conditions and, fundamentally, our view
16 is that just doesn't make any sense.

17 MS. THORNE: If I may, your Honor, respond?

18 THE COURT: You may, briefly.

19 MS. THORNE: Everything you just heard from
20 Ms. O'Connor I think proves the point of why it is important to
21 document the conditions at this facility. Whinstone's
22 expression of surprise that we are identifying these problems
23 is not well taken. We are not the only ones making these
24 arguments, there are other suits against them by other
25 customers that alleged just these problems with how they have

N895gmoC

Phone Conference

1 kept their facility, and I think what you just heard from
2 counsel was a lot of complaint about GMO not using the allotted
3 power. First and foremost, that was the basis of their
4 termination, supposedly, although one can simply take a quick
5 look at the Texas agreement and see that there is no obligation
6 to use any amount of power. But that, I believe, is not an
7 issue for today, we are not trying to argue the merits but I
8 think it is worth noting here.

9 THE COURT: Let's just stick to the issues to be
10 resolved in your application.

11 MS. THORNE: Sure.

12 One other issue is that counsel expressed that we
13 still have not told them our theory or the reasons we need
14 this, citing the statement that they never saw the supplemental
15 declaration. On the first meet and confer call they asked us
16 to explain exactly that. And I will tell you, I was not crazy
17 about doing that and having to provide them significantly more
18 information about exactly what our expert is doing and why,
19 when they have no like obligation. That being said, we sent
20 them a very detailed e-mail that went through all of the things
21 that are in the supplemental declaration. They have provided
22 no response, no meaningful response to that at all, no expert
23 of their own to say, no, you don't need this. And so, to come
24 now and say, well, you really don't need it because you should
25 have done it before when we were specifically barred from doing

N895gmoC

Phone Conference

1 that, doesn't land well.

2 THE COURT: Thank you. Unless there is anything else
3 you would like to address, Ms. Thorne?

4 MS. THORNE: No, not unless you have any other
5 questions.

6 THE COURT: I don't. I will just ask you to give me
7 one moment here.

8 MS. THORNE: Sure.

9 (pause)

10 THE COURT: Thank you all for your patience. I will
11 now issue my ruling on this dispute, and I will state now on
12 the record the reasons for my conclusion. I will follow this
13 with a brief written order.

14 Under federal common law and many procedural rules
15 that govern discovery, litigants in federal cases have a duty
16 to preserve documents and property that could potentially serve
17 as evidence in a lawsuit and courts have the authority to issue
18 preservation orders to enforce litigants preservation
19 obligations. The cite for that is *Toussie v. Allstate*
20 *Insurance Co.*, 2018 WL 11451597 and August 15, 2018 decision
21 from the Eastern District of New York in which Judge Ross also
22 collected cases for that proposition. Such preservation orders
23 are especially appropriate where there is a reasonable
24 probability that pertinent or relevant information will be lost
25 or destroyed, or the risk of loss or destruction in the absence

N895gmoC

Phone Conference

1 of Court intervention. While the Second Circuit has not
2 directly addressed the question of what standard a Court should
3 apply in determining whether to enter a preservation order
4 related to tangible property, courts in the Second Circuit have
5 generally rejected the view that a party seeking a preservation
6 order must also meet the usual requirements for a preliminary
7 injunction. And *Toussie* is a cite for that as well. Instead,
8 courts faced with motions to preserve certain discovery items
9 have applied a balancing test which considers three factors:

10 First, the level of concern the Court has for the
11 continuing existence and maintenance of the integrity of the
12 evidence in question in the absence of an order directing
13 preservation of the evidence; second, any irreparable harm
14 likely to result to the party seeking the preservation of
15 evidence absent an order directing preservation; and third, the
16 capability of an individual, entity, or party, to maintain the
17 evidence sought to be preserved not only as evidence as to the
18 evidence's original form, condition, or contents, but also the
19 physical, spatial, and financial burden created by ordering
20 evidence preservation. And the cite for that is *In Re: Matter*
21 *of Complaint of Specialist LLC*, 2016 WL 6884919, a November 22,
22 2016 decision out of this district from Judge Karas.

23 The first factor, which is the danger of destruction,
24 clearly points in favor of preservation. The defendant
25 (Whinstone) sent the plaintiff (GMO) a notice of termination on

N895gmoC

Phone Conference

1 June 29, 2023. That notice stated that Whinstone would remove
2 GMO's machines in 30 days, which would have been on July 29th.
3 Whinstone then sent a follow-up letter on July 24th urging GMO
4 to remove their machines and also warning that Whinstone would
5 remove the machines itself starting on July 29. Whinstone then
6 gave the plaintiffs one final chance until August 2nd to remove
7 the machines. And as of today it very well may be the case
8 that the only reason that Whinstone has not removed the
9 machines is because I issued orders directing that they refrain
10 from doing so including by disconnecting and/or disposing the
11 machines until further order.

12 So as to the first factor, I find that removal of
13 GMO's machines would be imminent absent further judicial
14 intervention.

15 The second factor which looks at the likelihood of
16 irreparable harm to the party seeking preservation also points
17 in GMO's favor. This action centers around a contract for
18 Whinstone to host Bitcoin mining machines at its facility. GMO
19 alleges that Whinstone failed to provide adequate power to the
20 machine, had improperly removed the machine from operation, and
21 failed to provide a fully functioning host center for the
22 machine.

23 Now, Whinstone on the other hand contends that the
24 machines are outdated or inoperable, therefore evidence about
25 the operations of GMO's machines is critical to the parties'

N895gmoC

Phone Conference

1 claims in this case as well as the defense's. And GMO's
2 expert, Mr. Hayward, avers that in order to fully and properly
3 assess the operation of those Bitcoin mining machines, he needs
4 to observe and document them on multiple occasions in operation
5 under conditions that they would have been in during the terms
6 of the contract.

7 Now, the third factor, however, which looks at the
8 burden of preservation points more in favor of Whinstone.
9 Whinstone's vice president of operations avers in his
10 declaration that continuing to host GMO's Bitcoin mining
11 machines at its facility would cost approximately \$900,000 per
12 month, and while GMO has agreed to compensate Whinstone for
13 continuing to host their machines at the same contract rate as
14 it has paid in the past several years, that will not account
15 for the approximately 4.6 million in lost profits per month
16 that Whinstone estimates it will suffer by not being able to
17 host newer, more efficient, and far more profitable machines in
18 the space currently occupied by GMO's machines.

19 When considering the facts I also note that GMO has
20 been on notice of Whinstone's plan to remove their machines
21 from its facility since at least June 29, 2023, but as
22 Ms. Thorne notes, it certainly would take time to bring the
23 expert up to speed. But even taking that into account, it
24 still was not until earlier this month that GMO's expert
25 finally arrived at Whinstone's facility.

N895gmoC

Phone Conference

1 Also, I note that this case is still relatively early
2 on in discovery. I referred this case to Judge Parker for
3 general pretrial supervision and I understand from the docket
4 that Judge Parker has set a fact discovery deadline of October
5 27th, 2023, and an expert discovery deadline of February 16,
6 2024. I note that for the reason that is at least somewhat
7 understandable that GMO may not have otherwise felt an urgency
8 in sending its expert to the Whinstone facility.

9 Having weighed all of these factors, I find that the
10 continued preservation of evidence that the plaintiff GMO
11 requests is appropriate but not for the full period of time
12 that GMO is requesting. Specifically, and as will be noted in
13 a written order, I order that Whinstone shall refrain from
14 disconnecting and/or removing GMO's machines from its Texas
15 facility for another five weeks. That will come to September
16 13th, 2023 at 5:00 p.m. During this time, GMO's expert shall
17 have access to the machines to conduct any observations, gather
18 any evidence as necessary, and do whatever he needs to do to
19 perform the evaluation that is appropriate.

20 GMO shall pay Whinstone for continuing to host their
21 machines at the same rate as the past several years, and such
22 payment shall be due by September 27th, 2023, two weeks after
23 the period of preservation expires.

24 I also note that GMO's machines shall remain
25 operational solely for the purposes of evidence preservation

N895gmoC

Phone Conference

1 and collection. Ms. O'Connor touched upon this a bit earlier
2 so I will address it. To the extent that GMO derives any
3 independent value from their machines remaining operational at
4 Whinstone's expense, Whinstone may amend its answer to assert
5 any counterclaim based on such unjust enrichment, and if that
6 is appropriate, any amended answer should be filed by September
7 27, 2023.

8 As I mentioned, a written order will follow and most
9 likely be on the docket later today or, at the latest, early
10 tomorrow.

11 Are there any other matters that we need to address,
12 Ms. Thorne, from GMO's perspective?

13 MS. THORNE: No. I think that is all we need.

14 THE COURT: And Ms. O'Connor?

15 MS. THORNE: Thank you, your Honor.

16 THE COURT: Thank you.

17 Ms. O'Connor?

18 MS. O'CONNOR: Yes. One final thing, your Honor. I
19 do need to be clear that the power in the Texas facility is
20 subject to curtailment pursuant to the Electric Reliability
21 Council of Texas Mandates (ERCOT), and GMO had expressly agreed
22 to this, so I just need to be clear in any order that to the
23 extent there is curtailment pursuant to ERCOT mandate, that
24 that is not impermissible.

25 THE COURT: Ms. Thorne, I take it there is no

N895gmoC

Phone Conference

1 objection to that?

2 MS. THORNE: No. We do not want them to violate any
3 regulatory obligations they have. We don't know the extent of
4 those regulatory obligations but to the extent that ERCOT is
5 requiring them to do that, that's fine. We have already made a
6 claim to some of those profits and would maintain that claim
7 but I think that's an issue for another day.

8 THE COURT: And Ms. O'Connor, just so I have the
9 language correct with respect to ERCOT, first of all, that's
10 the Electric Reliability Council of Texas; is that right?

11 MS. O'CONNOR: That's correct.

12 THE COURT: How would you propose that I phrase that
13 in the order?

14 MS. O'CONNOR: That the machines will be powered on
15 subject to any curtailment requested or required by ERCOT.
16 There is an agreement with ERCOT that GMO is aware of that
17 Whinstone is a party to, and pursuant to that agreement we are
18 required to curtail from time to time. I am not positive if I
19 have the exact language which is the only reason I am saying
20 requested or required by ERCOT.

21 THE COURT: Yes. I will include language that says
22 something along the lines of: *The machines shall remain*
23 *powered on through September 13, 2023, subject to any*
24 *curtailment requested or required by the Electric Reliability*
25 *Council of Texas.* So hopefully that covers it.

N895gmoC

Phone Conference

1 MS. THORNE: This is Leslie Thorne.

2 May we ask for a copy of that agreement so we can see
3 what is required?

4 THE COURT: Ms. O'Connor, do you have any objection to
5 providing that?

6 MS. O'CONNOR: No. I would think that they already
7 have it because GMO agreed to it, but I have no objection. I
8 will speak to my client.

9 THE COURT: Thank you, all. And I hope everyone has a
10 good rest of the day. Take care.

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